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## Challenging competency and capacity? Due regard to children's views in family law proceedings

### **Abstract**

Galvanised by the UN Convention on the Rights of the Child, many jurisdictions have introduced or strengthened children's rights to participate in family law proceedings. Yet, the research and legal literature continues to show difficulties in implementation. According to the literature, decision makers frequently view children as insufficiently competent or lacking in capacity to participate in proceedings. This article unpicks the concept of competence and capacity, both in relevant literature and reported case law from Scotland. The article asks three questions: What is meant by competence and capacity? How are they used? Do the concepts enhance or detract from children's participation rights? The article finds that competence is often casually used in the literature, alternative terms are used in reported case law (such as maturity), and judging capacity remains problematic in both law and practice. The article concludes that both concepts detract from children's participation rights, as the concepts suggest competence and capacity are inherent to the child rather than contextual and relational. If the concepts are to be used, they should be subject to more critique and precise definition. However, children's participation rights are more likely to be furthered by alternatives, such as fresh ideas about recognising and supporting people's legal capacity within the UN Convention on the Rights of Persons with Disabilities.

**Keywords:** competency; capacity; children; participation; family law; competent

## 1 Introduction

The nearly world-wide ratification of the UN Convention on the Rights of the Child (CRC) has led to many jurisdictions introducing or strengthening children's rights to participate in family law proceedings. Article 12, as a general principle of the CRC, is much heralded for its radical promotion of children's participation, which has challenged traditional conceptualisations of childhood and adult-centred systems and practices (Reid 1994; Smith 2007; Holzscheiter 2010). In many jurisdictions, as a result, children gained new rights and mechanisms to ensure that their views were heard in family law decisions – and that their views had some influence on the decisions (Birnbaum and Saini 2012; Freeman 2012). In particular, the focus of research, policy and practice has been on children's views having an appropriate place within decisions about parental responsibilities and rights when their parents separate or divorce. With the substantial rates of parental separation and divorce in many countries (United Nations Statistics Division 2016), such consideration of children's views has become increasingly salient.

As the literature has grown on policy and practice developments, so have research findings showing continuing or renewed concerns about implementation difficulties. Apparent successes in policy, whether in gaining rights in legislation or introducing supportive mechanisms for children's participation, are not always matched by documented successes and sometimes there have been retrenchments in terms of primary legislation or case law (Birnbaum and Saini 2012; Douglas 2013; Robinson and Henaghan 2011). Some children continue to have their rights to be heard denied by procedures or practices, informally or

formally. Or, if their views were heard by decision-makers, they are discounted or undermined, having little to no discernible influence on decisions.

How children and childhood are perceived influences how law recognises children's rights to participate, as eloquently described by Griffiths and colleagues:

It is clear that it is our particular societal conception of how children are different from adults, what differences are significant, and consequently how and when childhood should give way to adulthood, that informs our views of how the law should restrict, protect and empower children. (2013: 37)

A gripping conception of childhood in the past century has been the 'psychological child' (Hendrick 1997), with the influence of child development and particularly ideas of staged development cognitively (with leading research undertaken by Piaget (e.g. Piaget 1936)) and morally (Kohlberg 1984). This academic interest has led to increased valuing of children as sites of state intervention and now, combined with neuroscience, attention to the very youngest ages in the early years (Farrell et al. 2015). It has also led to a concentration on children as 'human becomings', with certain kinds of adulthood seen as the developmental goal, a focus on the individual child rather than the social, contextualised child, and widespread acceptance of the importance of age and developmental stages (James et al. 1998). Hinton (2008) writes of the resulting 'competence bias', where adults focus on the supposed developmental stages of children. Adults then perceive children as having limited or lesser competence than adults and children's potential participation is constrained. The concentration is on children's competence and not the adults' lack of competence in enabling children to participate. The psychological child, and the accompanying competence

bias, has both enhanced and detracted from children's status as participants in matters that affect them.

The preoccupation with the 'evolving capacities' of the child as central to children's welfare and their participation has a strong hold. Lansdown (2005), a promoter of children's rights, points out the significant distinction between adults and children:

An adult – at whatever age a society determines that to be – is legally presumed to have developed the necessary capacities in all these spheres to take responsibility for their own actions, irrespective of the reality of their competence. However, during childhood, the presumption is that, as children's capacities are evolving, they lack the competence to take responsibility for themselves. Children are therefore provided with social and legal protections that correspond with their perceived immaturity and vulnerability. (page xiii)

Children are not seen as having sufficient capacities to be competent enough to take responsibility for themselves. As such, judgements about children's best interests become relevant – so that children's immaturity and vulnerability must be addressed and protected. While protecting people's best interests are not a human rights principle more generally, it is a key one for children. Article 3(1) of the CRC requires that the best interests of the child is a primary consideration, in all actions concerning children.<sup>1</sup> This sets up the ongoing tensions, well documented in the literature, where children's rights to participate are

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<sup>1</sup> The full text of Article 3(1) is: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' The best interests principle has since been included *for children* in Articles 7(2) and 23(2, 4) of the UN Convention on the Rights of Persons with Disabilities (UNCPRD).

diminished because of adults' concerns about children's welfare (e.g. Henaghan 2012; Parkes 2015).

This article explores how concerns about and judgements of children's competence or capacity impact upon children's rights to participate in family law proceedings. It seeks to unpick these concepts, first in relevant literature and then in reported case law in Scotland. The article ends by returning to the pervasiveness of the psychological child and the associated competence bias, and how that is used to exclude rather than to include children within family law proceedings.

## **2 What is competence and capacity?**

Given how frequently competence and capacity are mentioned in the academic literature on childhood and children's rights,<sup>2</sup> it is notable how often they are used with little definition, interchangeably or not defined at all:

When considering the capacity of children and adolescents to reach decisions for themselves, writers, practitioners and the judiciary often use imprecise terms such as 'competence', 'maturity' and 'understanding'.  
(Fortin 2009: 86).

Fortin's book is well-cited within such discussions and provides considerable guidance about how to consider and reconsider children's capacity for decision-making within legal proceedings. However, even though she makes the above insightful comment, her subsequent chapter in fact does not define capacity, competence, maturity nor

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<sup>2</sup> This refers specifically to the childhood studies and children's rights literatures respectively – for example, this is a finding of Ljungdahl's (2016) analysis of the relations between competence and participation in child research. This is not a reference to other literatures, such as child development, where competence is defined and conceptualised.

understanding. This underlines the salience of these concepts within family law proceedings and also how they are often used loosely.

Certain consensus does exist on what constitutes legal capacity, in Scots law. Most leading textbooks start from the position that children have legal personhood at least at the moment of birth (e.g. Griffiths et al. 2013; Wilkinson and Norrie 2013). When born, a child has passive capacity: that is, the child has a complement of legal rights, such as the right to own heritable and moveable property (e.g. Thomson 2014, para 10.2). As a general rule, however, a child does not have active capacity: that is, a child cannot enter into juristic acts (Scottish Law Commission (SLC) 1987: para 3.22, page 14; Thomson 2014, para 10.2).

Parents or guardians are entitled to act as their child's legal representative for juristic acts, to pursue or defend actions on the child's behalf.

There are numerous exceptions to the general rule, many of which are set out in the Age of Legal Capacity (Scotland) Act 1991. This Act primarily deals with 'transactions' or what would be called juristic acts in civil law systems.<sup>3</sup> In the 1991 Act, young people aged 16 or above are generally considered to have equal capacity to adults (with some protections between the ages of 16 to 18). Under the age of 16, children can make transactions that are commonly entered to by children of a similar age and circumstances and under terms that are not unreasonable (S.2 (1)). Further, the 1991 Act lays out a child's capacity to consent to surgical, medical or dental procedures or treatments, when an attending qualified medical practitioner thinks the child 'is capable of understanding the nature and possibly consequences' (S.2(4)). The Act was amended so that a child with legal capacity can instruct

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<sup>3</sup> That is, an expression of will, which is to produce a lawful change in the legal position of the person expressing the will (see SLC 1987: para 3.22, page 14 and footnote 4).

a solicitor in any civil matter, when the child has a general understanding of what it means to do so (S.2(4A)). Competency is not used as a term within the primary legislation but can be traced in its underlying rationale. For example, the SLC report to Parliament (1987) refers to children's competency in two footnotes, both of which are extensive publication citations to bolster decisions about children's ability to participate in certain decisions.<sup>4</sup>

James and James define competence as: 'The ability, capacity or qualification to perform a task, fulfil a function or to meet the requirements of a role to an acceptable standard' (2008, page 34).<sup>5</sup> James and James write that, with some nuances, 'the notion of competence is not inherently complicated' (2008, page 34). However, the popularity of the word competence and competencies since, across a range of writings and disciplines, belie that assertion. The multiple uses of competence are discussed by other authors: for example, Ljungdahl (2016) finds that competence is used in three ways, in his review of child and youth research in relation to competence and participation. First, competence can refer to a bodily function (such as motor or sensory skills). Second, it can be used in a value-laden way, such as when promoting democratic skills. Third, competence is frequently used in a negative sense, to describe the *inability* or *incapability* of doing a particular task. The definition and use of competence is not so straightforward and clear as James and James asserted.

Schroeter (2008) reviews the definitions and descriptions of the term 'competence', with the first sentence of her review noting the 'myriad' literature and how it 'encompasses many related descriptors' (page 1). She makes a distinction between competence – 'a

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<sup>4</sup> For the sake of completeness, there is one more instance where competence is referred to: when referring to children aged 16 to 18 who are 'commercially competent' (page 10, para 3.6).

<sup>5</sup> The 2008 book *Key Concepts in Childhood Studies* does not have a section on capacity.



potential ability and/or capability to function in a given situation’ – and competency – ‘one’s actual performance in a situation’ (page 2). Competency is more than knowledge and skills; it is the ability and actuality of applying knowledge and skills successfully. Such a view is common within educational literature more generally, which has become increasingly interested in competence and competencies (see OECD Directorate for Education and Skills). Drawing on such literature, Bjarnadóttir (2004) argues that competence is what people are able to do by using their knowledge or skills, in particular situations. Further, she argues that competence is not an individual characteristic, static and essential. Rather, different competences are demanded by different situations, so that a person’s competence is itself situated and context-dependent.<sup>6</sup>

This brief review already raises questions about how competence and capacity are used generally and specifically within law and related literatures. First, legal capacity is used with legal precision but the concepts that underlie capacity – such as competence or competency – are used less precisely. Second, competence is widely used in various literatures, in a myriad of ways. Its relation to capacity, let alone legal capacity, is not always clear (does competence lead to capacity, or does capacity lead to competence, or can the concepts be used interchangeably)? Third, educational or professional discussions of competence have articulated that competence is more than having knowledge or skills; competence includes the possibility of using them. Schroeter (2008) suggests competency goes beyond this, to its actual successful application. Fourth, certain authors critique the view that competence is an essential characteristic, possessed by the individual. Competence itself can be

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<sup>6</sup> These ideas of competence draw on work undertaken by Le Borgne (2016), as part of her PhD thesis *Implementing Children's Participation at the Community Level: The Practices of Non-Governmental Organisation*.

understood as situational, something developed and expressed in context and relationally (see also Rogoff 1998; Chawla and Heft 2002). Fifth, discussions about capacity and competence can be as much about decisions about who *lacks* capacity and who is *incompetent*: notions to exclude rather than include certain people from certain activities or settings.

In the UN Committee's General Comment on Article 12 (2009), 'capacity' is often used to bolster children's participation – but also allows the exclusion of some children. The term is used 12 times within the document, in 6 paragraphs. A child's capacity is essential to two judgements: where a child is 'capable of forming his or her own views' and, if so, such views 'being given due weight in accordance with the age and maturity of the child'. The assumption should be that a child *is* capable of expressing his or her own views, as the General Comment states 'it is not up to the child to first prove her or his capacity' (para 20). Capacity is not defined within the General Comment. Maturity, however, is: '... in the context of article 12, it is the capacity of a child to express her or his views on issues in a reasonable and independent manner' and 'refers to the ability to understand and assess the implications of a particular matter' (para 30). Maturity must be considered when determining an individual child's capacity. The determination should be individualised to that child, and that matter, and be based on an assessment (para 20, 44, 52). The General Comment is advocating a wide interpretation of children's capacity and thus a wide application of children's views being considered and such views having weight in matters that affect them. But Article 12 and thus the General Comment allows for some children to be considered insufficiently mature and not capable of having an informed view and thus not able to exercise Article 12.

The recent discussions about legal capacity within the UN Convention on the Rights of Persons with Disabilities (CRPD) challenge some of these ideas in fresh ways. As discussed extensively in the article by Series (2015), Article 12 of CRPD creates a new model of legal personality and legal capacity.<sup>7</sup> In its most radical form, Series asserts:

This new approach treats a person's agency as shaped or even constituted by their environment and relationships with others. Instead of casting 'mental incapacity' as an individual deficit, resulting in a loss of legal capacity, it calls for the provision of whatever support is necessary to ensure that disabled people are able to exercise full legal capacity on an equal basis with others, and addressing discriminatory attitudes and barriers that might limit the recognition and exercise of legal capacity by disabled persons. (2015: 79)

Thus capacity is not a property of the individual but is situational. The fixation with individual rationality is fundamentally questioned and regarded as irrelevant, replaced by duties to support people's exercise of their legal capacity according to their will and preferences (UN Committee on Rights of Persons with Disabilities (2014)). Given the dominance of 'best interests' within children's rights and family law proceedings in particular, the rejection of 'best interests' within the support paradigm is provocative. The General Comment on the CRPD's Article 12 considers 'best interests' determinations as inconsistent with the support paradigm, giving insufficient respect to an individual's will and

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<sup>7</sup> Article 12 has 5 subsections. The text of the first three, which set out the generalities of the Article, are: '1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.' See also Arstein-Kerslake (2016).

preferences (2014, para 21). The support paradigm is thus provocative, in asserting all people's right to both legal standing and legal agency, in ruling out a best interests approach, and denying a role for judgements of mental incapacity.

The General Comment (2014) insists that this right be applied to all people under human rights law without derogation: '... there are no permissible circumstances under international human rights law in which a person may be deprived of the right to recognition as a person before the law, or in which this right may be limited' (para 5). Yet, the General Comment does qualify the right for children, in paragraph 36. The best interests principle *does* apply to children because of their developing capacities. Children with disabilities must have their will and preferences respected but only on an equal basis to other children and not to people more generally. It would seem that age allows for a derogation from the human right supposedly available to all. This is without a reasoned justification, in the General Comment, why a child's capacity is relevant but an adult's is not. The support paradigm is thus provocative in (re)considering legal capacity for children, but the General Comment itself demonstrates a competence bias.

### **3 A test case: Scottish family law proceedings**

If there are the above contestations about legal capacity and competence, how are these concepts used within Scottish family law? Do the concepts enhance or detract from children's participation rights? Scotland is a provocative 'test case' for such questions, as policy-makers explicitly sought to implement Article 12 of the CRC and ensure children's views are given due regard in family law proceedings (SLC 1992; Tisdall 1997). Based on the Children (Scotland) Act 1995, Scottish family law had the strongest provisions in primary

legislation for children's views to be duly considered, across the UK jurisdictions. Part I of the Act sets up that parents have parent responsibilities first, to their children, and rights are consequential to those responsibilities (S.1 and 2). When making any major decision in relation to a parental responsibility or right, parents must have regard to their child's views as far as is practicable, taking account the child's age and maturity and views of any other people with parental responsibilities or rights in regards to the child (S.6). Presumably decisions such as children's contact and residence during and following parental separation would constitute such a major decision. Thus children's views should be considered whether or not parents take their dispute to court.

Should court proceedings be initiated, courts are charged with giving due regard to children's views. While the paramount consideration of the court is a child's welfare (S.11(7)(a)) when making a decision about parental responsibilities and rights under S.11, a court must:

... taking account of the child's age and maturity, shall so far as practicable:

- i) give him the opportunity to indicate whether he wishes to express his views;
- ii) if he does so wish, give him an opportunity to express them; and
- iii) have regard to such views as he may express. (S.11(7)(b))

A child aged 12 or above shall be presumed to be of sufficient age and maturity to form a view (S.11(10) as well as S.6(1)). A number of mechanisms follow on from the primary legislation:

- If children are served with papers once the case enters the court process (called 'intimation'), they receive a Form F9 requesting their views. The form goes back to the sheriff.<sup>8</sup>
- The court may appoint a court reporter or curator ad litem to report on the child's views.
- The sheriff may express the wish to hear directly from the child and ask for the child to be brought to the court.
- The child may give evidence as a witness, at a proof. A child can use 'special measures' to help the child give evidence, as a 'vulnerable witness' under S.11 of the Vulnerable Witnesses (Scotland) Act 2004.
- A child may take independent legal advice. If this were done, the child's views can be expressed in several ways. The lawyer may help the child to fill in Form F9; the lawyer may write to the court on the child's behalf; or the lawyer may seek to have the child involved as a party to the action.
- Alternatively, the lawyer may appear on the child's behalf at the Child Welfare Hearing to express the child's views. The Child Welfare Hearing provides an early hearing to resolve any disputed issues in family actions, particularly in relation to children.<sup>9</sup>

Thus, the legislation and accompanying mechanisms are detailed and provide a range of opportunities for a child's view to be duly considered by the court.

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<sup>8</sup> At the time of writing, a sheriff is a professional judge in the second tier of courts. A sheriff would hear most family law cases in the first instance – but some cases are heard in the Court of Session in the first instance.

<sup>9</sup> This list is largely taken from Tisdall and Morrison (2012) and Tisdall (2016a).

The decision by the Inner House of the Court of Session, on *Shields v Shields* (2002 SC 246), helped clarify the participation provisions of the 1995 Act. The first test is 'practicability' and it has a low threshold: 'But, if, by one method or another, it is 'practicable' to give a child the opportunity of expressing his views, then, in our view, the only safe course is to employ that method' (para 11). Only after a child expressed views should the court judge what weight should be given to the child's views, in making the court's decision. Further, the appeal decided that a child had an absolute right to discretion and a hypothetical situation could not be used. Courts could not rely necessarily on an earlier decision about a child's views but had to consider whether there has been a material change in circumstances. In *Shields v Shields*, the considerable lapse of time between the child's intimation being dispensed with, and the court decision being taken, was such a material change. Thus, a court needs to consider each child's participation individually and whether this could change over time or due to circumstances.

However, the 'success' story of Scottish family law in ensuring children's right to participate is more variable or questionable than the above presentation would suggest. Research published in the past five years shows problematic implementation (Whitecross 2011, Mackay 2013a and 2013b; Mair et al. 2013; Morrison et al. 2013; Morrison 2014).

Procedural problems have been acknowledged by the Scottish Courts and Tribunals (2009). The Form F9 is being substantially revised, as a result. Official clarification has been given to courts that the full papers need not be sent out to children, on intimation; while this was never required by court rules, the perception that it was required held back some courts from intimation for a child (Mackay 2013a). Firmer training and requirements are being set out for court reporters. These reforms, however, do not yet address more fundamental barriers such as the potential competence bias.

For this article, two searches of reported case law were undertaken through Westlaw database. First, reported case law was identified by searching for references to S.11(7)(b) of the Children (Scotland) Act 1995: in other words, case law that is annotated as addressing children's participation rights in S.11 orders. This gives insight to courts' interpretations of this provision but only when children's participation is identified as a legal issue. Thus, second, another search and analysis was undertaken of reported case law, for the last 12 months, of S. 11 cases more generally.<sup>10</sup> This provides the opportunity to analyse more generally how children's views are presented and used in written decisions. A review of reported case law has its disadvantages because of how cases are selected for reporting. Cases are selected because they are perceived as making a significant legal point. They are likely not typical of all cases. The analysis therefore also uses empirical research undertaken in the past five years, with legal practitioners and children (see references above) and MacKay's research in two sheriff courts, where a full range of cases were considered in 2007. Reported case law is more likely to be appeal cases, whereas children's participation in family law proceedings is more likely to occur in sheriff courts. Thus appeal cases may be commenting on how lower courts deal with children's participation rights or indeed consider children's views but the appeal courts themselves rarely interact with children directly themselves. Reported case law from sheriff courts, therefore, was given a separate analysis, as well as considering all the identified reported case law together. Together, the analysis suggests that there are distinct trends.

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<sup>10</sup> Specifically, from August 2015-2016. This resulted in 17 reported cases.



#### 4 Trends in Scottish case law

Children's views used to be largely absent from reported family case law in Scotland (Marshall et al. 2002). Children's views were rarely mentioned decisions and even less as pivotal to the decision. This has gradually changed since the implementation of the 1995 Act and particularly after *Shields v Shields*.

Now, cases more regularly mention whether or not a child's views are sought. If a child's views were not sought, then a simple statement is usually made, such as in *A v B* (2016 S.L.T. (Sh Ct) 389): 'In this case, the children are too young to be able to express a view' (para 41) and, then, with a bit more elaboration, 'Given their ages both agents agreed, correctly in my view, that the children are too young to express a view' (para 49).<sup>11</sup> This is the extent of the discussion, with the agents' assertions accepted by the court, without an apparent independent assessment or individualised comment on each child. This lack of attention is underlined by the inability to find out how old the two children actually are, from the reported case. The reported case is not explicit on the children's birth dates, although it does state (for other reasons) that the children's births were registered in Algeria in 2010 and 2014 respectively; if done close to the time of childbirth, then the children would have been 6 and 2 respectively at the time of the court's decision. As children as young as age 3 and 4 have been judged as having sufficient age and maturity, within decisions about parental rights and responsibilities (e.g. see *Stewart v Stewart* (2007 CSIH 20); Mackay, 2013a), the simple statements excluding children beg further evidencing. Age is apparently easily accepted as a reason to not give children an opportunity to express their views,

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<sup>11</sup> See also *M v F* (2016 Fam LR 70): 'Parties in the present case agreed – correctly – that given IM's very young age [4.5 years] and level of maturity it would be inappropriate to seek to ascertain her views on the proposed relocation or to have regard to any views which she might express' (para 3).

despite *Shields v Shields*' encouragement to consider the *means* to support children to communicate their views 'as far as is practicable' and that the threshold to participate is low indeed. Such a finding matches that found by Mackay in her research in sheriff courts. Age – and sometimes for quite old children, above the age of 12 – was used by most solicitors acting for parents, to ask the court to dispense with sending the Form F9 to children (Mackay 2013b). Thus age is used as a shorthand to deny children's active capacity and their competence to participate.

As discussed more extensively elsewhere (Tisdall 2016a), court's age-based concerns about a child's welfare can preclude children's rights to participate. Children's direct involvement in court proceedings has not been encouraged by the courts nor been prevalent in practice. Lengthy time proceedings are seen as 'inimical to the best interests of the child' (*B v G* 2012 UKSC 21, para. 21). Drawing on the Supreme Court's judgement in *B v G*, subsequent cases show the concern about children's views being sought too often and causing pressure on children (see *Hall v Hall* 2014 WL 4063101). The question of whether there has been a 'material change of circumstances' – a key issue within *Shields v Shields* – is not addressed. Welfare concerns are allowed to exclude the child's right to express her views, in *C v S* (2016 WL 01566076). As part of the decision, the Sheriff writes: 'Having regard to the age and to the need for the re-introduction of contact to be carefully managed, I do not consider it appropriate to seek the child's views on the matter' (para 63). In addition to age, the court's opinion on what is in the child's best interests (i.e., re-introduction of contact) trumps the child's right to express a view. Such a qualification is not found in the primary nor secondary legislation. In the reported case, welfare concerns are allowed to qualify procedural rights, even though a child's welfare is the paramount consideration for the court in *deciding* whether or not to make a S.11 order and what it should be – not as a qualification on

process rights.<sup>12</sup> Courts' views on the parents' attitudes and actions (which may or may not be in the best interests of the children in question) start to mix with the process rights of children to have their views considered: if a parent is perceived as acting inappropriately in asserting their child's rights to have views considered, then this seems to weigh against the child's views being included (see *B v G*, *Hall v Hall*, as well as *Stewart v Stewart*). Thus, it may not be the child being perceived as incompetent, or lacking legal capacity, but that welfare concerns are privileged over a child's right to participate.

Who decides on children's competence to participate? The judge at the first instance has considerable discretion (*O'Malley v O'Malley* 2004 Fam LR 44, *X v Y* 2007 Fam LR 153, *S v A* 2015 WL 1839055). Appeal cases show a strong reluctance to interfere in the initial judges' discretion, perceiving them as best placed to make the case-by-case decision on both whether a child's views should be heard, and what weight should be given to them. This is firmly stated in *Stewart v Stewart*: 'At the time of proof, the child was under three years old, and it was clearly within the sheriff's discretion to take the view that to seek the views of a child of that age would be wholly impractical' (para 12).<sup>13</sup> Thus, appeals are more likely – but not definitely -- to be successful if *no* consideration were given to whether or not a child's views should be gathered, but less so if the sheriff made an explicit decision not to do so.<sup>14</sup>

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<sup>12</sup> Although to note that the CRC's General Comment on Article 3 (2013) does require children's best interests to be a procedural concern.

<sup>13</sup> The judgement's dramatic wording may have been influenced by the court's view of the appellant's submissions. The appellant had criticised the sheriff for not considering the child's views, amongst other issues. These submissions were described in the judgement as 'simply misconceived' (para 11).

<sup>14</sup> Or if a child's views were taken at some point during the proceedings. *C v M* (2005 Fam LR 36) stated that as the children's views had been considered earlier in proceedings, it was the sheriff's discretion 'to decide whether that lapse in time amount to a material change of circumstances' (page 40) that thus required an additional opportunity for the children to express their views.

At least until recently, judges and children rarely met. If children's views were considered at all, their views are considered via reports (of the 299 children involved in the cases considered by Mackay (2013a), a court reporter was appointed for 68 children (23%) and a curator ad litem for a further 15 children (5%)). Thus children can face layers of interpretation and judgements about their competence: first, the reporter, curator ad litem or other expert decides what to report and presents an interpretation; a sheriff, then, will decide what is relevant and to assess how much weight to give this in the sheriff's decision. While Mackay's fieldwork found few instances of direct engagement between the judge and the child, detailed examples can be found, in reported case law. An example is *G v G* (2014 WL 2194580). In this judgement, the judge's considerable effort is described, in creating a context that would support the child expressing his views. Judicial interviewing, or children being witnesses in private law proceedings, may become more common, particularly given recent advocacy for them in England (see Bala et al. 2015; Cobb 2015; Hale 2016). J

While Mackay's research undertaken in 2007 suggests that few children have their views considered in s.11 court processes at all, reported case law does have notable examples and increasingly more discussion of them. For example, *M v M* (2008 Fam LR 90) dedicates 8 out of 68 paragraphs to describing and weighing up GM's views. The paragraphs are mostly descriptive, rehearsing what the defender, pursuer and curator ad litem perceived as GM's views. Then, the case is unusual amongst others in taking two paragraphs to discuss explicitly the weight given to the child's views. The first paragraph rehearses the opinions of witnesses with professional expertise:

There was some discussion in the evidence about GM's ability to express his views and make decisions. The educational psychologist, Isobel Murdoch, said that a 10

year old could be persuaded by arguments, that the way something was presented could colour a 10 year old's views and that she did not know if GM was more susceptible than the average 10 year old. It would be a very difficult task, in her view, for a 10 year old to weigh up all the factors. His head teacher, Elizabeth Gordon, thought that his decisions would be based on pleasing whoever is asking him to weigh things up. His class teacher, Rosemary McPhee, did not think it was as simple as that, but thought that weighing up the pros and cons would be tricky for him. (para 53)

The educational psychologist draws on child developmental knowledge, in her comments about an 'average 10 year old'. On the presumption that the educational psychologist will have the least personal knowledge of GM and his class teacher the most, the comments increasingly recognise the complexity of expressing views for GM, as the professional knows GM more closely. None question that this notion of competence – able to have and express rational, autonomous, stable decisions – is the desired norm. The Sheriff in *M v M* accepts this:

It is perhaps obvious that a 10 year old would not be able to balance all the factors in making a decision. It is also clear that a child would not want to change the status quo. Nonetheless, GM did not and does not want to go and one of his reasons is factually correct, that he will not see his extended family as regularly as before. Since also all are agreed that GM has never changed his mind, I think this must be his own opinion. Some weight must

be given to it, recognising that it cannot be based on having weighed up all the relevant factors. (para 54)<sup>15</sup>

The dominance of the competence bias is underlined by the choice of words ‘It is perhaps obvious’ and ‘It is also clear’. There is a need to justify the assertions but the wording appeals to the assertions being self-evident and thus not questionable. Of note in the importance the Sheriff gives to GM’s views having ‘never changed’. This is used as evidence that his views must be GM’s own. Through this detailed example, the grip of the competence bias on the courts can be seen, with the acceptance that a child’s view should be rational, autonomous, and stable. It is a trend that can found widely in the reported case law (see Tisdall 2016b for discussion).

One of the most undermining judgements of a child’s views is being characterised as ‘influenced’ or ‘manipulated’ (Barnes 2008). With the increasing discussion of Parent Alienation Syndrome (Eaton and Jarman 2016), concerns that a child has been unduly influenced by another parent are gaining increasing credence.<sup>16</sup> The characterisation tends to be either/ or: a child is either unduly influenced or the child is not. This is a judgement made for GM above and is replicated throughout reported case law. For example, S is described in *S v S* (2004 Fam LR 127) as ‘now being able to articulate to the reporter instructed by the court a clear, strongly felt and apparently genuine wish to remain in this country’ (para 22) and in *G v G* 2014 the child is described as ‘without any sign of being coached and with no detectable bias in favour of either parent’ (para 28). The contrasting

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<sup>15</sup> This wording is echoed by *M v G* (2010 WL 1608452): ‘One must bear in mind that a child may not be able to balance all the factors which an adult would have to consider. One should also not be surprised if a child would prefer the current arrangements to continue. One may assume that a child may not wish to lose friends or have contact that he or she enjoys reduced.’ (quoting the same Sheriff as in *M v M*, para 15)

<sup>16</sup> PAS is highly contested as diagnostic syndrome and often very problematic in its (mis)use within parental responsibilities. For a balanced and thorough overview, see Saini and colleagues (2015).

opinion, that a child has been pressured by parents or given material bribes, or coached to speak like adults, is written negatively in judgements (see *Bailey v Bailey* 2001 Fam LR 133, *Hall v Hall*, *Ellis v Ellis* 2003 Fam LR 77, *C v M* 2012 GWD 9-170 and *E v W* 2014 WL 4063090). If a child's views were discussed in such a doubtful way, they may not only lead to the judge giving little or no weight to those views; they may even be used as evidence *against* taking account of the child's views when deciding what is in a child's best interests.

Thus, reported case law continues to show correlations between how a child's views are described and how they are viewed by the court. While not using the terms of competence or capacity, they draw on ideas similar to Lansdown's above. A child's view will be given more weight if the child were perceived as competent, in being able to have a rational, autonomous and stable view, weighing up different factors. A child is not seen as competent if the child is anxious, ambiguous, unable to balance up factors and unduly influenced. The view is largely individualistic and essentialist, rather than situational and contextual.

Perceptions of children as developing, having evolving capacities, transitioning into adulthood, have a firm hold in the reported case law. While case law does show attention to some of the 'here and now' issues for children, such as schooling and peers, best interests are more commonly determined by what will be in children's best interests in the future (see Tisdall and Morrison 2012). The construction has such a hold that judging what is in a child's best interests into the future is described by one sheriff as 'common sense' requiring no particular expertise (*Q v P* 2016 Fam LR 54, para 40). As referred to in *S v S*, children's *increasing* clarity and ability to express a 'competent' view is referenced by the court and influential in the judgement of it. A child's evolving capacities is a familiar trope within reported cases.

## 5 Conclusion

While concerns about children's capacity and competence fill the pages of children's rights literature generally, participation more specifically, and participation in family law in particular, the terms are not explicitly nor regularly used in Scottish reported case law. The case law understandably refers to the words used in statute – age and maturity – to justify how children's participation rights are met. This is a finding in itself. Given the above analysis, it suggests that the use of terms such as 'age' and 'maturity' without interrogation are obscuring attention to how children's capacity and competence are being judged and evidenced.

This article demonstrates the grip of the competence bias, and associated conceptualisations of children and childhood, have on Scottish case law. A success of child development research has been its permeation of professional arenas, to become part of 'common sense' and public understandings (James et al. 1998). The 'age and stage' framework continues to have a strong hold outwith child development spheres. It can be seen in the easy use of age as a reason to include or exclude children, without any further evidence or justification needed. When one considers discussions of age and age thresholds for relevant legislation, footnotes reveal the use of child development evidence that assesses competence. For example, the Scottish Law Commission's *Report on Family Law* (1992) set out the draft legislation, which largely became the key provisions of family law in Scotland through the Children (Scotland) Act 1995 Part 1. Here, children's rights to have their views duly considered in decisions about parental responsibilities/ rights are justified, for what become S. 6 and S. 11(7)(b). Psychological evidence is used to justify these



provisions, and particularly the age of 12 presumption, as recognising ‘the actual capacities of most young people in that age group’ (page 53, para 5.25). The accompanying footnote then refers to three references on child development, including one by Piaget.<sup>17</sup> Here, developmental ideas of capacity are relied upon, leading to a potential competence bias

The competence bias does not necessarily accurately reflect child development research and theory. Research and theory now recognise that children are far more competent than Piaget’s classic tests showed, depending on the situation and contexts. If children were with familiar people, in familiar settings and have experience of tests, they show more cognitive competence (Donaldson 1978). Alderson and colleagues repeatedly demonstrate this in applied research on children’s medical consent, showing how children at very young ages, who have experience of particular medical conditions, can have very informed views on their treatment and its short and long term implications for their ‘best interests’ (Alderson 1993; Sutcliffe et al. 2004). Rogoff’s work has persuasively unveiled the assumptions behind what is valued or not valued with such theorisations, by undertaking research in non-Western contexts (e.g. Rogoff et al. 2007). She shows how cognition is a collaborative process, filled with cultural assumptions of what is valued and inevitably socially developed and situated. Literature now documents how all people are in the process of ‘becoming’ and development is inherently social, scaffolded by others and interfacing with meso and macro influences (e.g. Bronfenbrenner 1979; Donaldson 1978; Rogoff 1998). We thus have considerable research that competence is situated and relational but that finding is largely

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<sup>17</sup> For the sake of completeness, the footnote refers to three psychology references in total and to page 46 of Freeman’s book *The Rights and Wrongs of Children*.

ignored by the assessments and judgements about ‘capacity’ in the UNCRC’s General Comment and ‘age and maturity’ within Scottish family law proceedings.

As Ljungdalh (2016) describes, discussions of competence and capacity are as much about judging who is *not* competent and capable as to who is. They are concepts to exclude as well as include. Recent discussions in England, about increasing the inclusion and involvement in children in family law proceedings, are provocative. Sir James Munby (2015), President of the Family Division in England, strongly advocates for improved and increased involvement of children within the family justice system. Substantial progress is being made in recognising the rights and needs of ‘vulnerable’ people within court proceedings in England and special provisions must be provided for them. Children are part of this wider group -- along with people who have disabilities, who use English as an additional language, or have experiences of care or domestic violence – who should receive additional support, recognition and rights to participate. Thus, the value of improving and increasing children’s direct participation in family proceedings is recognised, but in a vulnerability paradigm (Munby 2015: 899). While this attention may improve children’s experiences, the vulnerability paradigm is not a strongly emancipatory one, when only those who are currently disadvantaged by societal practices and power hierarchies are considered ‘vulnerable’.<sup>18</sup>

The potential of Article 12 of the CRPD is even more radical, because it is not relying on the inherent capacity or incapacity of disabled people. While it may draw on ideas of autonomy, autonomy is perceived as relational, situational and environmental, shaped if not intrinsically social and materially influenced. The question then is not to judge someone’s

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<sup>18</sup> See Peroni and Timmer (2013), Sherwood-Johnson (2013) and Tisdall (2016b).

autonomy or capacity as an either/or decision, but rather to provide the necessary support to ensure disabled people can exercise their full capacity. Hints of this are evident in CRC provisions, where children have a right to receive information, in order to develop their own views. As Lundy and McEvoy (2012) suggest, this means that children's participation rights do not simply mean accessing a child's 'voice', but rather than children have the right to support in developing their views as well as expressing them. Children also may need support to have their views expressed and heard in ways that allow children to demonstrate their capacity. Even if the more radical notion of children's self-determination is not taken on board (and, indeed, self-determination may not be the appropriate principle when negotiating family relationships), the paradigm changes.

Family law proceedings need no longer follow a competence bias, for children's participation. The court system would no longer be assessing whether a child's views should be allowed into the proceedings nor whether such views should be discounted on the grounds on competence. Instead, we would be focusing on the information children would need to be participate, we would invest in support for children to develop and express their views, and children's involvement in family law proceedings would become the norm rather than the exception. We would have a radical form of child-inclusive proceedings, where we do not use concerns about a child's welfare as a reason to ignore the child's rights to participation. Instead, the focus is to make proceedings as constructive and supportive of children as possible, perhaps requiring radical changes in what are currently adversarial and formal approaches.

## 6 Acknowledgements

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